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IN THE

Supreme Court of the United States

The CITY OF RICHMOND, a municipal corporation,
Petitioner

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

On a petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

The CITY OF RICHMOND, a municipal corporation,
Petitioner

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

On a petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit

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Brief for the Petitioner

In the Circuit Court of Appeals of the United States, for the Fourth Circuit, the City of Richmond filed a brief which covers the points involved in this petition so fully, that leave is respectfully asked to file the brief there used in support of this petition. It will appear that the contest here is between the sovereign claiming taxes and the landlord claiming rent. Your petitioner claims taxes due from the Ainslie Carriage Company, Inc., a Bankrupt, for the years 1907-1908-1909 and 1910, aggregating seven hundred and ninety-four dollars and sixty-three cents ($794.63), exclusive of interest and penalties. The respondents were the landlords of the bankrupt and on November 1, 1909, levied a distress warrant upon the goods and chattels of the Company for the sum of two thousand nine hundred and ninety-eight dollars and sixty-nine cents ($2,998.69). The rent year began April 1, 1908, and the rental was at the rate of two thousand dollars ($2,000.00) per annum. On

November 4, 1909, receivers were appointed for the Ainslie Carriage Company by the Chancery Court of the City of Richmond, on a petition filed on the preceding day, and on February 3, 1910, the Company was adjudged a bankrupt in involuntary bankruptcy proceedings, filed on November 6, 1909, in the United States District Court for the Eastern District of Virginia. At the time of the receivership—November 4, 1909,—the City of Richmond had not distrained for the taxes due for any of the years named and, of course, could not do so after that date on account of the Court proceedings. The question, therefore, is whether the landlord by his distress levy for rent takes precedence over the right of the City to its taxes. In the District Court of the United States for the Eastern District of Virginia the decision was in favor of the City of Richmond, but the Circuit Court of Appeals—Woods, J., dissenting—reversed the District Court and held in favor of the landlord.

ERRORS RELIED UPON.

1. The Circuit Court of Appeals erred in supposing that the petitioner relied upon Section 67 (f) of the Bankrupt Act, which forbids the acquisition of liens within four (4) months of the filing of a petition in bankruptcy. The point was incidentally mentioned on page 22 of the original brief as being a question upon which the courts were divided. It had no real part in the argument addressed to the Court and yet, approximately, one-half of the opinion deals with this question on which no reliance was placed by your petitioner.

2. The Court erred in holding that Section 64 (a) of the Bankrupt Act did not require the payment of the taxes due in this case in preference to the landlord's rent.

3. The Court erred in its interpretation of the word "dividends" in Section 64 (a) of the Bankrupt Act.

4. The Court erred in holding that the City was not given a lien by state and municipal laws superior to that of the landlord.

5. The Court erred in holding that the lien given

the City by state and municipal laws was limited to the indentical goods and chattels assessed, instead of being binding upon all the personal property in the possession of the taxpayer.

6. The Court erred in holding that the City lost any of its rights by reason of the laches of its officers.

7. The Court erred in holding that the case of *Jackson Coal Co.* v. *Phillips Line,* 114 Va. 40, was binding upon it and conclusive of the case at bar.

8. The Court erred in refusing to allow recovery of the taxes due for the year 1909, while allowing those for the year 1910; whatever may be true of its decision in refusing to allow the taxes due for the years 1907 and 1908.

CASE ARGUED.

The Court is respectfully referred to the argument set out in the brief filed in the Circuit Court of Appeals, which is attached hereto, for the main reasons supporting the petition, but leave is asked to add thereto by making the following observations:

In the argument in the Court below the claim of the City to a lien for its taxes was not always borne in mind by counsel, nor indeed by the Court itself. It is true that the landlord is given a right by V. C. 2791 to distrain for rent due, on any goods of the lessee, or his assignee, or undertenant, found on the premises, but it is also true that this right is limited by Section 2792 of the Code of Virginia, which provides that: "neither this nor the preceding section shall affect any lien for taxes, levies or militia fines." It was admitted in argument that the lien here referred to was an inchoate or an implied lien and, indeed, this must be so, else the state—which cannot levy until June 15th in any year—and the City—which cannot levy until September 1st in any year—would always be defeated of taxes by any creditor perfecting a lien for his ordinary debt prior to those dates. That the lien thus mentioned is an inchoate or an implied lien is conclusively established by the fact that no express lien is given by any statute for taxes assessed against personal property

to either the City or the state. It was also admitted in argument that the tax for 1910 must be paid, although it was not assessed until after the landlord's levy of November 1, 1909, and although no levy could be made by the City until September 1, 1910. In other words, the respondents claim that the taxes of 1907, 1908 and 1909 should not be paid because no levy was made, and yet admit that the tax of 1910 must be paid, although no levy could be made. That the tax for 1910 must be paid is undoubtedly the law, but the reason for it is destructive of the respondents' contention in this case. If it be true, as it is true, that taxes assessed against property in the hands of the Court must be paid, although not supported by a perfect lien, in preference to the landlord's distress levy for rent, made prior to the assessment, then it must be true that the inchoate lien for taxes takes precedence over any rent lien, whether perfected before or after the assessment.

It was also admitted in argument that the right of the City of Richmond to distrain for its taxes was unlimited and continuous as to time, and the Court so states on page three of the opinion complained of. The only limitation urged, and enforced by the Court, was that the right to levy—given the City of Richmond by its charter—was limited to the identical goods and chattels assessed with the taxes, and for the taxes due thereon. This contention was upheld by the Court, notwithstanding the provisions of the City ordinances, Section 8 of Chapter 14, providing that "any goods or chattels in the City, belonging to the person or estate assessed with taxes, may be distrained therefor," and notwithstanding the provisions of Section 622 of the Code of Virginia—under which the City had a right to act, as well as under its charter—that "any goods or chattels in the corporation or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable or collector." If this were true, it must also be held that each article of property was subject to be sold only to the extent of the amount of taxes assessed

upon it and would lead to great perplexity and confusion. "The Legislature intended to bind all of the personal property in the hands of the taxpayer from the time the collector received his warrant until it is paid."

Hill v. *Figley*, 23 Ill. 418-428.

27 *Am. & Eng. Enc. of Law*, p. 739, and cases cited.

In regard to the true intent and meaning of Section 64 (a) of the Bankrupt Act, reliance is placed on the argument used in the original brief. It will be remarked here, however, that this is the only provision relating to the payment of taxes contained in the Bankrupt Act and that, since the United States is placed upon the same footing as the state and City, unless this provision contemplates the payment of taxes prior to all other claims, and whether the taxes be a lien or charge upon the property or not, both the United States and the state and City would lose their taxes in every case in which a landlord, or any other lienor, perfected his lien before the agents of the government took steps to enforce the payment of the taxes due. Thus, the right to public revenues would be made subordinate to contract debts, and depend upon the prompt action of the government agents. The law, however, is that the doctrines of waiver, laches and estoppel cannot be invoked against the sovereign unless by its consent, and in this case there is no such consent. Section 64 (a) of the Bankrupt Act does not order that the trustee shall pay taxes for which liens have been perfected, but that he shall pay all taxes legally due and owing, and the case of *New Jersey* v. *Anderson*, 203 U. S. 489, determines that such taxes are legally due and owing as of the date of assessment. It also holds that such taxes must be paid, although there is no property in the state assessing the taxes and, therefore, no lien upon the property for the tax. This case likewise distinguishes between taxes and debts, holding that taxes are imposts levied for the support of the government, whereas debts are obligations founded on contract. It is, therefore, contended

that the Bankrupt Act itself contemplates the payment of taxes, regardless of their being a lien upon the property, in preference to all contract debts, whether supported by lien or not. In this connection, great reliance is placed by the respondents upon Section 67 (d) of the Bankrupt Act, to which reply is made that this section preserves, and intends to preserve, liens as against all contract creditors, but does not intend to subordinate the imposts levied for the support of the government to a contract debt, nor to encourage a race of diligence between such contract creditors and the agents of the government, charged with the duty of collecting such imposts. And, secondly, reply is made that by virtue of V. C. 2792 and V. C. 622, as well as by virtue of the sections of the charter and City ordinances cited in the original brief, the City does have a lien for its taxes and the lien of the landland is expressly made subordinate thereto by V. C. 2792. In the third place, if the construction of Section 67 (d) contended for by the respondents is to prevail, any contract creditor perfecting a lien will supplant the government, national and local, and subordinate its claims to the revenues necessary for the support of government, unless a perfect lien therefor has been previously obtained. Although it is contended by your petitioner that this is not the true intent of Section 67 (d), it is again insisted that in this case, under the state and municipal laws just referred to, the City does have a lien wihch is superior to that of the landlord.

The lien thus given cannot be lost by laches on the part of the municipal officers in the absence of any statute to that effect. In the case of *re Weissman*, 178 Fed. 115, taxes for twelve (12) years were allowed. In this case the respondents herein cited the referee's statement, which the Court reversed. In *Bank* v. *Ewing*, 103 Fed. 168, taxes, interest, penalties, and costs were allowed for the yeaars 1895, 1896, 1897 and 1898. In *re Stalker*, 123 Fed. 961, city taxes were allowed for the years 1893 to 1901, inclusive, except 1897 and 1899. In *Waco* v. *Bryan*, 127 Fed. 80, taxes were allowed for the years 1897 to

1902, inclusive. In this case, contrary to respondents' brief in the Court below, the Court refused to allow a lien and only part of the realty was sold prior to the bankruptcy proceeding. The quotation made by the respondents was from the dissenting opinion. In the Stalker case there was a statute of limitations, which is not true in the case at bar and, indeed, such a statute is contrary to Section 174 of the State Constitution, which provides that: "after this constitution shall be in force no statute of limitations shall run against any claim of the state for taxes upon any property." Besides, the Court held that the taxes should be paid, except in cases of property sold on mortgage subject to taxes. *In Powell's Executor* v. *Richmond,* 94 Va. 79, taxes were allowed for the years 1876 to 1881, inclusive, and 1888 to 1892, inclusive. This case likewise held that the City of Richmond had an unlimited lien for its taxes upon real estate, although the state lien was limited by statute to a period of five (5) years; and a like argument is made for the unlimited lien of the City of Richmond in regard to its lien for personal taxes. In *Marye* v. *Diggs,* 98 Va. 749, which was cited and relied on by respondents, taxes were recovered from 1876 to 1894, inclusive, and, although it is true that the Court then held that neither the state nor the county could maintain an independent suit in chancery to enforce the tax lien, this decision brought about an amendment of the statute on February 14, 1901, since which time Section 456 of the Code of Virginia, after providing for an express lien on real estate for taxes and levies, provides: "which lien, in addition to existing remedies for the collection of taxes and levies, shall be enforcable by suit in equity." The case of *Greeley* v. *Provident Savings Bank,* 98 Mo. 458, quoted by Chief Justice Fuller in *Re Tyler,* 149 U. S. 184, says nothing as to liens being involved, but it reverses the lower Court which refused payment of taxes because of the collector's failure to intervene within the time prescribed by the Court, thus holding that the collector's laches could not defeat the sovereign of its revenues.

Leave is respectfully asked to notice at this point the criticisms made by the respondents in the argument in the Court below of certain cases cited by your petitioner; and it is first noted that respondents did not concede the 1910 tax until the argument in the Circuit Court of Appeals. In *Hecox* v. *Teller,* 198 Fed. 636, the property on which the tax was levied was mortgaged so heavily that it had been relinquished by the trustee to the mortgagee, yet the Court held that the tax must be paid out of the bankrupts estate. In *re Keller,* 109 Fed. 131, the stock of goods was assessed after the adjudication and was sold free and clear of all liens. As a result, the tax claims were transferred to the proceeds of sale, and it was held that they must be paid. In the case of the *Yoke Vitrified Brick Co.,* 180 Fed. 235, also relied upon by the respondents, it will be found that the Court, on page 239, concludes its opinion by saying:

> "Anything inhering in the general principle of equity or the law such, for example, as the duty of the property to contribute its just proportion of the expenses of government, or *pro rata* of the expenses of the preservation of the estate, and such like matters, remain still enforcable against the estate, althought covered by fixed liens. This point was decided in *In re Crammond,* 145 Fed. 966."

In *Chattanooga* v. *Hill,* 71 C. C. A. 584, Sixth Circuit, it was held that all taxes legally due and owing must be paid out of the assets, although only fifteen per centum (15%) thereof came from property not covered by a mortgage and although the taxes aggregated more than fifteen per centum. In *re Kallak,* 147 Fed. 276, it was contended that taxes are a claim, to be paid with other claims in the ordinary course of administration, but the Court held that taxes do not constitute a claim in bankruptcy and to the question: "What ought to be paid under Section 64 (a) of the Bankrupt Act?", the answer was in the words of the Act itself: "All taxes legally due and owing." In *re Prince and Walter,* 131 Fed. 546, the citation of which

respondents criticised, sale was made subject to the first mortgage only which, of course, was a sale free of tax liens and thereupon the second mortgagee claimed the proceeds of sale. The claim seems to have been allowed, but the taaxes due on the real estate so sold were paid out of the personal fund. It was, therefore, a case of marshalling of assets, the mortgagee being given the benefit of the fund on which alone he had a claim, and the taxes being paid out of the personal fund which was also subject to them. It is true the Court quoted Section 67 (d) of the Bankrupt Act, which, however, would merely emphasize the priority of the tax claim if it were a lien, as is the case here.

Having thus referred to some of the cases cited by your petitioner, and criticised in the Court below by the respondents, your petitioner now respectfully asks the Court to consider the attached brief as a part of its brief in this Court.

In the United States Circuit Court of Appeals

FOURTH CIRCUIT

ELIZABETH W. BIRD,
LOULIE W. NOLTING, AND
CHARLES E. WHITLOCK,
} Petitioners

vs

CITY OF RICHMOND, Respondent.

On petition to superintend and revise in matter of law proceedings of the District Court of the United States for the Eastern District of Virginia at Richmond. In bankruptcy.

BRIEF OF THE CITY OF RICHMOND.

This contest is between the city of Richmond, claiming taxes legally due and owing by the Ainslie Carriage Company, bankrupt, and the petitioners, claiming rent due by the bankrupt. The tax claim is for balance due for the year 1907, $169; for the year 1908, $294; for the year 1909, $294; for the year 1910, $37.63; a total tax claim of $794.63. The landlord's claim is for rent due for the year beginning April 1, 1908, at a rental of $2,000 per annum and aggregating $2,998.69, as of November 1, 1909. On that day the landlord levied a distress warrant for that amount and on the same day levied attachments aggregating $833.33 for rent, to become due up to April 1, 1910. On November 3, 1909, a pe-

tition was filed in the chancery court of the city of Richmond for the appointment of receivers for the company, and they were appointed on November 4, 1909. On November 6, 1909, a petition in involuntary bankruptcy was filed in the United States District Court for the Eastern District of Virginia, which was followed by an order of adjudication and reference on February 3, 1910.

The fiscal year of the City of Richmond begins on February 1 of each year (Richmond City Code, 1910, chapter 13, section 8), and it will be seen from the citations to the charter and ordinances of the City that it is vested with the right to distrain for its taxes without limitation as to time and that both the collector of taxes and the collector of delinquent taxes were invested with that power.

CASE ARGUED.

It will be contended in this brief, first, that the City of Richmond is entitled to priority over the landlord for the taxes legally due and owing by virtue of the Bankrupt Act, Section 64 (a) and, second, that nothing in the State law affects or can affect the priority thus given. Taking up the first proposition, Section 64 (a) reads as follows: "The court shall order the trustee to pay all taxes legally due and owing to the United States—State, County, District or Municipality—in advance of the payment of dividends to creditors." Unless there can be found elsewhere in the act language which will control this provision, it is conclusive of the case at bar and we do not think such language can be found.

The contest here is between the local sovereign claiming its revenues and a creditor claiming a debt. As was said in *Murrays' Lessee, at als* v. *Hoboken Land Co.*, 18 Howard 272-282: "Imperative necessity has forced a distinction between such claims (taxes) and all others." This principle, we think, is the foundation of Section 64 (a) of the Bankrupt Act and leads to its proper interpretation. As Judge Cooley states in his second volume on taxation, 3rd Ed., p. 834; taxes should "be paid without raising any question of the means of enforcement by process and before all other claims

excepting judicial costs." This contention is supported both by text writers and by the courts. Thus, Collier on Bankruptcy, p. 889, says: "Construed strictly, the words of subdivision (a) section 64, result that taxes must be paid in any event, even if the property on which the taxes are assessed never came into the possession of the trustee. The courts will not favor an evasion by too literal a construction." The same author, at page 891, further says: "If the taxes are legally due and owing they must be paid, although long overdue;" citing

In *re* Weissman, 178 Fed. 115, where it was held that the "taxes must be paid as a prior claim," although there had been gross laxness on the part of the collector—the taxes having remained unpaid for a period of twelve years—and although their payment would take a large part or all of the money otherwise payable to creditors. It must be remembered that taxes are not debts and that the City and State are not creditors and, indeed, that the taxes need not be proved but must be paid as a duty by the trustee whether prove dor not. In *re* Fisher 148, Fed. 907. Fourth Dillon Municipal Corporations, section 1414. Remington Bankruptcy, Sec. 703, p. 423. Mr. Collier sums his examination of the authorities and his consideration of the true construction of Section 64 (a) at page 892, saying: "The weight of authority seems to sustain the view that the taxes, whether a lien or not, are to be paid before any *distribution* is to be made to creditors;" citing

In *re* Hollenfeldts 94 Fed. 629; in *re* Heilberg 6 A. B. R., 714; *New Jersey* v. *Anderson*, 203 U. S. 483.

He also declares at page 895 that taxes "assessed prior to adjudication are legally due and owing on the day of assessment, although not payable until after adjudication;" citing In *re* Flynn 134 Fed. 145; *New Jersey* v. *Anderson*, 203 U. S., 483, and further declares that taxes which the trustee is required to pay carry interest until paid, the reason against allowing interest in ordinary cases having no application in the case of public taxes. In *re* Kallak 147 Fed. 276; in *re* Schuyler 21 A. B. R. 428.

Remington on Bankruptcy, Vol. 1, p. 1319, *et sequa*, says:

> "It is incorrect to say as is said in *re* Veitch 4 A. B. R. 112, that taxes come under section 64 (b) (5) in the order of priority. On the contrary, Section 64 (a) specifies a distinct order of priority. It would be deprived of all meaning if taxes were comprehended within Section 64 (b) (5). In *re* Stalker 10 A. B. R. 713-123 Fed. 961: The significance of Section 64 (a) is that a claim for taxes is paramount to all other claims because of the pecuniary needs and requirements of the municipality. The right to such priority belongs solely to the State or municipality."

Nor do we think that a State statute can override the Act of Congress even if a lien exists for the rent, for a landlord's priority can only be over those claims not specified in the Bankrupt Act as being of even higher right, since the order of distribution prescribed by the act must be followed. This was held in: In *re* Consumers' Coffee Co. 151 Fed. 933.

Section 64 (a) is, in fact, an enactment by Congress of a long established practice in all courts of equity. The principle is thus enunciated in 2 Cooley, on Taxation, 3rd Ed., p. 834:

> "The court having in its charge or under its control a fund or other property upon which taxes are due will, as a representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process and before all other claims excepting judicial costs. Thus, upon proper application and suitable proof, a receiver will be ordered to satisfy a tax assessed against the property in his hands and a like direction will be made in other cases where funds are held subject to the order of a court."

This principle is affirmed by Chief Justice Fuller in the case of in *re* Tyler 149 U. S. 184, where he quotes with approval from *Greeley* v. *Provident Savings Bank*, 98 Mo. 458-460:

"The amount of the taxes was undisputed and the receiver had in his hands sufficient funds to pay them and we think the order should have been made. It may be conceded that the State would not have an express lien upon the assets that entered the hands of the receiver but it had a right paramount to other creditors to be paid out of those assets * * * a right which it could have enforced through its revenue officer by the summary process of distress * * * but for the fact that the property and assets of its debtor had passed into the custody of its courts, whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled assertion of which depends the power to protect the very fund being distributed and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the *distribution* of assets in *custodia legis* except in subordination to that right. The ordinary revenue officers of the State being deprived of the ordinary means of securing the States' revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied and upon the receiver to see that the taxes due the State were paid before the estate was *distributed* to other creditors: and we can conceive of no scheme of administration that the court could properly adopt by which the State's demand could be reduced to the level of an ordinary debt and be cut off unless presented to the court for allowance within a given time."

The fact that the property is in the custody of the court "does not," says Chief Justice Fuller, "involve interruption in the payment of taxes or the displacement or impairment of hte lien therefor, but on the contrary it makes it the imperative duty of the court to recognize as paramount and enforce with promptness and vigor the just claims of the authorities for the prescribed contributions to State and municipal revenue."

These principles are recognized and approved by Whittle, J., in the case of *Taylor* v. *Sutherlin-Meade Co.*, 107 Va. 797 holding: "It is the universal rule that a court as the representative of the sovereignty of the State will make no order

for the distribution of funds in *custodia legis* until provision is made for payment of taxes and levies due to the Commonwealth and its municipalities." Citing Alderson on Receivers, 205; *Bank* v. *Ewing C. C. A.*, 103 Fed. 168, and other cases. Indeed, in Virginia, we have a Statute—Pollard's Code, Sec. 492 (b), Acts of Assembly, 1897-98, p. 824, which provides as follows:

> "No decree or order shall be entered by any court of the Commonwealth directing the payment, *distribution or other distribution* of any funds, securities, monies or other property under its control, or under the control, or in the hands of any receiver, commissioner or other officer of the court, or any executor, administrator, trustee or other fiduciary, unless it shall be made to appear to such court that all taxes and levies upon such funds, securities, monies or other property have been paid, or unless the payment thereof be provided for in such decree or order, and no commissioner, executor, administrator, trustee or other fiduciary, receiver, trustee or bank, or other person or corporation shall pay out any funds in hand under the order of any court unless a receipt for the taxes is produced, showing said taxes to have been paid, or unless such order shall so state'.'

See also Acts of Assembly 1910, p. 96, Ch. 65. This Act of Assembly is similar to the Act of Congress Rev. Stat. U. S., Sec. 3466, which requires that debts due to the United States shall be first satisfied, or, more strictly, to the provision in the Bankrupt Act of 1867, which gives priority of payment to all debts due to the United States and all taxes and assessments under the laws thereof, or to the State in which the proceedings were pending. It is apparent, therefore, that originally as a rule of equity, just as an equitable supply lien was allowed priority over mortgage and other lien creditors, so taxes due the sovereign were allowed priority, and that this rule has now been crystalized into a statutory requirement applicable to all courts. It is our contention that Section 64 (a) of the Bankrupt Act intends to enact and does enact this principle into the provisions of the Bankrupt Law,

and we think that this contention has been affirmed by the Supreme Court of the United States in the case of *New Jersey v. Anderson*, 203 U. S. 483, as well as in other cases that will be cited. In the Anderson case, Mr. Justice Day, p. 489, makes the following significant remarks:

> "It is to be noted that there is a very significant difference in this respect in the Act of 1898, from the provisions in the Bankrupt Act of 1867. * * * the act of 1867 gives priority of payment to all debts due to the United States and all taxes and assessments under the laws thereof, all debts due to the State in which the proceedings in bankruptcy were pending and all taxes and assessments made under the laws of such State * * * the requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing without distinction between the United States and the State, county, district or municipality."

It follows, therefore, that unless the construction of section 64 (a) contended for be sound, the United States itself must be postponed as to its taxes to the claim of a landlord under similar circumstances. This would be a violent departure from the principles heretofore accepted and heretofore adopted in all Bankruptcy Acts. The Anderson case further holds the well rocegnized proposition that taxes are not debts but are imposts levied for the support of the government. It likewise holds that the language of the act is very broad and includes all taxes. As a consequence, it was held that the franchise tax imposed by New Jersey upon the bankrupt corporation which, although chartered in New Jersey, had no assets in that State and no business therein, but did its business and had its assets in the State of Illinois, was none the less to be paid as a prior claim by the Bankrupt Court, even though to do so might "take away from the local creditors in the State where the property of the corporation is situated, practically all the assets of the corporation in favor of the State where the corporation is organized, but has no business or property. And it is urged that to permit a State

under such circumstances to have a preference in the payment of taxes, would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property * * * the question is: is the claim a tax legally due and owing to the State of New Jersey?" It was held that it was a tax legally due and owing to the State and must be paid, notwithstanding the insistence that "the amount claimed for the year 1903 had not accrued at the time of the adjudication in bankruptcy, which was on April 23, 1903, the return being made on May 2, 1903," and the court said:

> "The annual return required to be made to the board on or before the first Tuesday in May is upon the basis of the capital stock issued and outstanding the first of January preceding the making of the return. The Bankrupt Act requires the payment of all taxes legally due and owing. Certainly, the tax thus assessed upon that basis was legally due and owing, although not collectible until after the adjudication. It follows that the State need not have a lien for its taxes and yet must be given preferential payment of them under the Bankrupt Act, even though to do so exhausts the assets of the bankrupt."

Since it was held in *Swartz* v. *Hammer*, 194 U. S. 441, that property in the hands of a trustee in bankruptcy is not exempted from liability to State taxation by the Bankrupt Act, and that the Bankrupt Court must pay taxes assessed against the property in its hands "together with accrued penalties and fees provided by law," it follows, from the Anderson case, that the taxes for 1910—$37.63—must be paid in the case at bar. Indeed it was conceded in argument that this was so. It likewise follows, although it was not conceded, that the taxes for 1909—$294—must be paid in the case at bar, because, at the time of the receivership—November 3-4, 1909—and at the time of the petition in bankruptcy—November 6, 1909—the taxes for 1909 were current taxes still outstanding in the hands of the Collector of Taxes and might have been paid at any time prior to January 1, 1910, without

having become delinquent. The taxes of 1908 must also be paid because, at the time of the receivership and petition, they were in the hands of the Collector of Delinquent Taxes, whose duty it was to collect the same by distress. This is also true of the taxes of 1907, for it will appear that the right and power of the City of Richmond to distrain for taxes which are legally due and owing is unlimited.

Many other cases may be cited. Among them we note *Waco* v. *Bryan*, 127 Fed. 80 (C. C. A.), which held:

> "64 (a) is perfectly plain and seems to admit of very little, if any, construction. It is contended that it is inequitable to compel payment by priority of taxes levied on property which does not come into the hands of trustees. To this it is sufficient answer to say that the priority to be given is within the control of the lawmaker and is fixed absolutely by statute, which cannot be varied to meet what equity and good conscience may require. From the foundation of the Government it has been the policy of the United States to exact priority in favor of the United States in all cases of insolvency * * * U. S. Rev. State., Sec. 3466 * * * the sovereign cannot be hindered or embarrassed or postponed in the collection of its revenues. This policy was recognized in all bankrupt laws heretofore passed—Section 62 of the Act of April 4, 1900; Section 5 of the Act of August 19, 1941; Section 28 of the Act of March 3, 1867. The present Act gives priority for all taxes legally due and owing * * * in advance of dividends to creditors. In other words, it puts taxes due the State and City on the same footing as taxes due the United States."

See also *Dayton* v. *Standard*, U. S. Supreme Ct., Rptr., Vol. 36, No. 16, p. 695.

To the same effect is *Hecox* v. *Teller*, 198 Fed. 636, in which it is said:

> "In the Circuit Court of Appeals of the Fifth Circuit, it was held in *Waco* v. *Bryan*, 127 Fed. 79-62, C. C. A., 79—that the taxes must be paid from the bankrupt estate, although they are a lien upon the real estate, which did not come into the hands of the

trustee. And the Circuit Court of Appeals of the Sixth Circuit in *Chattanooga* v. *Hill*, 137 Fed. 600—71 C. C. A., 584—held that the taxes must be ordered paid independently of whether they were secured by lien or not."

Continuing, the court said:

"The bankrupt might have paid all taxes immediately prior to the filing of the petition against him. This would not have been a preference. The law means that the trustee is to do what the bankrupt might have done and what good citizenship required him to do."

We also cite the following cases, approved by the Supreme Court in *Swartz* v. *Hammer*, 194 U. S., *Supra*.

Re Conheim, 100 Fed. 268.
Re Keller, 109 Fed. 131.
Re Sims, 118 Fed. 356.

We also cite:

Re Prince and Walter, 131 Fed. 546, held: "Taxes as a class are thus put at the head of everything."

Cooper Grocery Co. v. *Bryan*, C. C. A., Tex., 127 Fed. 815.

Re Fisher, 148 Fed. 907.

Re Stalker, 123 Fed. 961.

Re Kallak, 147 Fed. 276, held: "Section 64 (a) and Section 17 clearly show the intent of Congress that public revenues should not be prejudiced by the Bankrupt Act. This is clear that estates in *custodia legis* are taxable by the State and municipality."

Re Tilden, 91 Fed. 500, held: "This paragraph—Section 64 (a)—is a manifest recognition by Congress of the proposition that, whether any other creditors be paid or not, the Government—National, State or Municipal—is to have its taxes out of the estate."

Re Weissman, 178 Fed. 155.

Re Consumers' Coffee Co., 151 Fed. 933.

Re Tebo, 101 Fed. 419, held: "The costs and expenses of administering an estate in bankruptcy and wages due to workmen, etc., must be paid before there

is any distribution to creditors and, although there are specific liens on the estate sufficient to absorb it all, they must be postponed to such costs, expenses and wages.

Re Hilberg, 6 A. B. R., 714, held: Taxes legally due and owing by the bankrupt at the time of adjudication are a prior claim and must be paid before the secured creditors."

Re Industrial Cold Storage Co., 163 Fed. 390.

Re Cramond, 145 Fed. 966, held: "Liens actually existing at the time of adjudication are first to be paid, excepting taxes."

Loveland on Bankruptcy, 3rd Ed., Sec. 267 (a), p. 769.

It will be observed that the language of section 64 (a) is that the taxes are to be paid priod to "dividends to creditors." There can be no controversy over their priority to unsecured creditors but it is claimed by petitioners that, having secured a lien by a distress levy prior to the petition and adjudication, they are entitled to be paid in full in preference to the taxes, upon the theory that they do not get a dividend and that dividends are only paid to unsecured creditors. That this is erroneous has been held in the cases of *re* Muhlhauser, 9 A. B., 81 and *re* Barber, 97 Fed. 547. In the last named case the meaning of the word "dividend" is discussed at length and it is said:

> "The dispute is as to the proper construction of the word 'dividend.' Objecting creditors insist that a dividend, within the meaning of the law, is declared and paid only on unsecured claims—citing in re Fort Wayne Electric Corporation 94 Fed. 109, while the referee urges that all monies paid upon any claims of creditors which have been voluntarily submitted by holders for payment by and through the administration of the estate in the courts of bankruptcy are paid as dividends. Dividend is a business term applied to a division among stock holders of a fund arising from profits or to the division among creditors of an insolvent of the fund arising from the assets of the insolvent's estate. In either case, it is the fund that is divided and the part so allotted is a dividend. Divi-

dends upon profits may be at one rate to preferred stock holders and at another to common stockholders. So, in insolvency, a creditor having a priority may be paid in full; yet it is as certainly his dividend or portion of the fund as is the small percentage of his claim which the general creditor may receive from the same fund * * * Section 64 strengthens the conclusion. It provides that taxes are to be paid in advance of dividends to creditors. This excludes taxes from dividends, but nothing else. Payment of debts having priority are made to creditors from the fund arising out of the assets, to each his proper dividend. Such payments are put on the dividend sheets which he must deliver to the trustee under Clause 1, Section 39. Section 57 (1) is as applicable to priority claims as to claims of any other kind and supports this construction of 'dividend.' The misconstruction seems to have arisen from a mistaken idea that dividends, instead of relating to a division of the fund according to the rights of creditors of whatever class, has some fanciful relation to such debts as are not to be paid in full.

"Section 65 (a) usually referred to in support of this idea does not purport to cover all dividends and the other sub-divisions of Section 65 are applicable only to that same general class of creditors as dividends to priority creditors are fully covered by Section 64.

"That the word 'dividend' had in the Act of 1867, the meaning here claimed for it is very obvious. Rev. Stat. U. S. Sec. 5101-5102. Had Congress intended to change it, that intention would have been plainly expressed.

Besides, the actual language of Section 65 (a) points to this construction. The language is to the effect that equal dividends shall be paid on all allowed claims "excepting such as have priority or are secured." This plainly means that the dividends paid to priority or secured claims are not equal but are in accordance with their several amounts. It is tantamount to saying equal dividends must be paid on all allowed claims, excepting that dividends to priority and secured claims must correspond with their amounts. Were this not so, in a case in which by fortunate or skilful management every claim

was to be paid in full, there would be no dividend, because in such a case the dividends would not be equal but would correspond to the amounts of the several claims. See also 5 Cyc. 387.

One of the cases relied on by petitioners in the court below, is the case of *New Jersey* v. *Lovell*, Trustees, 179 Fed. 321. The case does not decide any point involved in the case at bar. It expressly refuses to determine whether 64 (a) prefers taxes to creditors asserting liens—the point here involved—though it may be said to express the opinion as a *dictum* that taxes are to be paid ahead of creditors without liens. The point actually decided, however, is that costs of administration are to be paid ahead of taxes, and the reasons given by the court for deciding this point are significant and potential in upholding the construction of 64 (a) here contended for. They are that, if taxes were given precedence to such costs, they might "absorb the whole fund and leave unpaid the agency by which its payment was effected. Whether it be right to prefer costs to taxes or not, the reasoning reaches much further and, if the non-payment of the agency of administration justifies a construction paying costs before creditors, for much stronger reason will it justify a construction paying taxes due the sovereign, without which the court itself could not exist, before creditors. By this reasoning a creditor, whether a lien creditor or not, must yield to the costs of the court and, for a greater reason, should yield to the taxes—without which the court could not exist.

It will be observed that taxes existing prior to adjudication are legally due and owing on the day of assessment although not payable until after the adjudication. *New Jersey* v. *Anderson*, 203 U. S. 483—*Re* Flynn 134 Fed. 145.

That the construction of Section 64 (a) here contended for is correct is still more evident when it is considered that taxes are not debts and that the United States, State and City, are not creditors under the bankrupt law. They need not be proved and tax claimants have no voice in the selection of the trustee. *Re* Cleanfast Hosiery Co. 4 A. B. R. 702; *Re* Fisher 17 A. B. R. 704; *Swartz* v. *Hammer* (C. C. A., 8th

Circuit), 56 C. C. A. 92, affirmed 194 U. S. 91—*re* Kallak 147 Fed. 276. In this last case it was expressly held:

> "Public taxes do not constitute a claim in bankruptcy. It is not necessary for public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors and no voice in the selection of the trustee and the liability for taxes is in no way affected by the discharge. On the other hand, it is the duty of the trustee to ascertain from the public records the amount due for taxes and report to the court and thereupon it is the duty of the court to order payment if there are sufficient funds for that purpose."

This being so, the necessities of the sovereign demanded that the Bankrupt Act should expressly provide for its taxes and the act does so in section 64 (a), nor is the priority thus given taxes inequitable for, as it was held in the case of county of *Yuba* v. *Adams*, 7 Cal. 3537, which case was cited and quoted from with approval by Chief Justice Fuller in the case of *re* Tyler 149, U. S., *supra*.

> "The levy of the tax giving to the intervenor a judgment and lien on the property assessed having the force and effect of an execution, it might be enforced in the same manner as other executions * * * this lien was not divested by the subsequent proceedings but the fund, being in the custody of the law, was not liable to seizure and the proper remedy was by direct application to the court for the fund in its possession.

After making this quotation, Chief Justice Fuller, in 149 U. S. 185, continues:

> "If such be the ordinary rule in the State courts, it is quite apparent that it is the only one that can be properly applied where property is in the custody of the courts of the United States."

As a consequence, it follows that the bankrupt court takes the property subject to a claim for taxes, which has the force and effect of a judgment and lien enforceable by distress and

dating from the date of the assessment. It would be inequitable to ignore such a claim, nor does the fact that taxes are legally due and owing for several years affect the status of the State's claim for, as we have seen in the case of *re* Weissman 178 Fed. 115, the laches of the tax collector cannot be made a defence to the claim of the State. See also *re* Conheim 100 Fed. 268, cited with approval in *Swartz* v. *Hammer*, 194 U. S., *Supra*. In this connection we cite the case of *State* v. *Rowse*, 49 Mo. 486, in which a packet company had for several years neglected to pay taxes and made an assignment, and the court held:

> "It is admitted that the State has no express lien by statute on personal property, but is not the obligation to pay taxes of such an important character as to make the claim of the State upon the property of the tax debtor paramount to that of other creditors? By the common law all debts due the Crown were preferred to private claims. So far as taxes are concerned, every court requires that this rule be rigidly observed. Liability for them is not an ordinary one and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of the government and I know of no authority that places the obligation to pay them upon a level with liabilities upon contract. If the claim of the State were an ordinary one, as of an individual, the authorities cited show its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statute provision upon the subject."

This reasoning is exactly in point, as between the contract debt for rent and the claim for taxes. On this point we cite also *Re* Tilden 91 Fed. 500; *Re* Weissman 178 Fed. 115, and other cases previously cited. It may be noted that the landlord's claim for rent is placed by the schedule under Section 64 (b) 5; where it was placed by the decisions in the cases of *Re* Bishop 153 Fed. 304; *Re* Byrne 97 Fed. 762, and *Re* Tebo 101 Fed. 419, and the truth would seem to be that the act preserves the lien creditors as against the bankrupt

and all other creditors, but, being mere contract debts, it makes them inferior to those owing to the sovereign as contributions for the support of the government. A final consideration in support of our contention, is found in the language of Section 64 (b) which provides that debts shall have priority and be paid in full, with the significant language added: "except as herein provided." Since section 64 (b) contains nothing more after this statement than the bare enumeration of the five sub-divisions in their order of payment, what can be meant by the words "except as herein provided?" These words are a direct reference to the provisions of subdivision 64 (a). That is to say, the act tells us in terms that it does contain a provision which over-rides the priority and order of payment prescribed by 64 (b). This was expressly held in the case of *Re* Halsey, 175 Fed. 825 and it is impossible to understand how 64 (b) can be appealed to as prescribing the order of priority and 64 (a) ignored. In conclusion of this discussion, the admission by the petitioners that the taxes of 1910 should be paid, is a destruction of their argument against the payment of the taxes of the preceding years. Aside from the fact that the tax of 1909 was the tax of the current year at the time of the receivership and petition in bankruptcy, there is no dispute that all of the taxes are legally due and owing and it would seem that if the property in the hands of the court is subject to taxation by the municipality—of which there can be no question—and that such taxes must be paid in preference to the landlord's claim for rent—which is also beyond question—it must follow that the same reasoning requires payment of all taxes legally due and owing. *New Jersey* v. *Anderson*, 203 U. S., *Supra*, *Re* Weissman; *Re* Conheim, and *Swartz* v. *Hammer*, already cited in this brief.

This leads us to the second head of this discussion and it will be claimed that this court must follow the decision of the State court in the case of *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 50. It is, therefore, insisted at once in reply that this case cannot be held as controlling the decision in the case at bar. It might be pertinent if this were a claim

by the State or by the City of Petersburg, but, whatever may be true of the Charter powers of the City of Petersburg, the limitation noted in the decision is not true of the Charter of the City of Richmond. It is significant that an examination of the record in that case shows that no brief was filed or appearance made on behalf of either the City of Petersburg or the State. It was held that the lien on the property was lost to the City and State after the date which terminated their right to distrain for the taxes in controversy and the court said that the State lost this right after the lapse of one year from the day on which the taxes were assessed. It declared that the City of Petersburg lost the right to distrain when its taxes were returned delinquent. Waiving for the present the question of the State's right to distrain, although the statute cited by the court (V. C., Sec. 623), says one year after the date fixed for the final settlement of the Treasurer with the Auditor of the State—and not one year after the assessment—and, although the decision seems in direct conflict with the opinion of Whittle, J., in *Taylor* v. *Sutherlin-Meade*, 107 Va. 797, as well as with the Statute (V. C., Sec. 492 (b)), it is very certain that the City of Richmond does not lose its right to distrain when its taxes are returned delinquent, as is said to be true of Petersburg.

The City Charter, Section 73, provides:

> "All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon and no deed of trust or mortgage upon goods and chattels shall prevent the same being distrained and sold for taxes assessed against the grantor in such deed, while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

It may be noted here that Section 622 of the Code gives a similar right to the State to distrain for its taxes upon the goods and chattels of the delinquent "in the hands of any person." Section 51 of the City Charter also provides:

"It shall be the duty of the said collector (of taxes) on the first Monday in February of each year, to turn over to the Auditor of the City, all bills, assessments and accounts for all preceding years, upon which there shall then remain unpaid any part of any tax or assessment due the City and thereupon the City Auditor shall turn over the same to the officer of the City, who shall be chosen by the City Council and known as the collector of delinquent taxes * * * the said collector of delinquent taxes shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the City Charter upon the Collector of Taxes."

In conformity with these Charter sections, Chapter 16, Richmond City Code, 1910, and especially sections 6, 7, 8, 10, 11, 20 and 22, which are in all essential respects identical with the same sections of Chapter 14, Richmond City Code, 1899, excepting for an amendment to Section 11, were enacted vesting the Collector of Taxes with power to distrain. These ordinance provisions, so far as pertinent, are as follows:

"(6) The collector shall proceed to collect all of the taxes assessed * * * as long as the same are allowed by the City Charter and by the ordinances of the City to remain in his hands for collection."

"(7) If all taxes with which any person * * * is assessed be not paid before the 1st day of September, the collector shall distrain, except where one-half thereof has been paid, under the third section (this third section requires the payment of all or one-half of the taxes assessed on or before the 30th day of June of each year, and unless one-half be so paid a penalty of five per cent. is added to the whole tax. The remaining half or the whole tax with penalty, must be paid on or before the 31st day of December)."

"(8) Any goods or chattels in the City belonging to the person or estate assessed with taxes may be distrained therefor.

"(10) No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained or sold for taxes assessed against the grantor

in such deed whilst such goods and chattels remain in the grantor's possession, nor shall such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found." (City Code, 1899).

"(11) Where the collector or the collector of delinquent taxes, as the case may be, cannot find sufficient goods or chattels to distrain for taxes, any person indebted to or having in his hands estate of the party assessed with such taxes may be applied to for payment thereof out of such debt or estate and a payment by such person of the said taxes, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. If the person applied to do not pay so much as it may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall * * * procure from the Police Justice a summons * * * and from the time of the service of any such summons the said taxes shall constitute a lien on the debt so due from such person or on the said estate in his hands." (City Code, 1899).

"(20) If there be good cause to believe that a person assessed with taxes not owning real estate intends to remove his property out of the City or to sell out or close his business therein, the collector may, unless such taxes be paid on demand, distrain therefor, although the first day of September may not have arrived and although one-half thereof may have been paid.

"(22) * * * It shall be the duty of the said collector * * * on the first Monday in February of each year, to turn over to the Auditor of the City, all bills, assesments and accounts for all preceding years, upon which there shall then remain unpaid any part of any tax or assessment due the City and thereupon the said Auditor shall turn over the same to the collector of delinquent taxes, who shall proceed to collect the same * * * and who shall have the same power to collect by the same methods and processes, all tax bills, assessments and accounts delivered to him as are conferred by the Charter and the ordinances of the City upon the Collector of the City taxes."

It is plain, therefore, that the right to distrain given by Sections 51 and 73 of the Charter, and by the ordinances cited, contain no time limit and that the collector of delinquent taxes has precisely the same power to distrain as the collector of taxes has. If, therefore, it be true that the right to distrain for taxes in the City of Petersburg is lost after they are returned delinquent, as stated by Judge Cardwell, in the Phillips Line case, then this case is not controlling so far as the City of Richmond is concerned, because there is no such loss of the right to distrain and, if the loss of the right to distrain by the City and State is the reason for the loss of the tax lien, as stated by that decision, it follows that the City of Richmond, which has not lost its right to distrain, has not lost its lien. It follows, too, that the City has a lien for its taxes prior to the actual levy of the distress to enforce it, for the court so holds, else it could not be lost. The right of the City of Richmond to distrain for its taxes given by the Charter sections mentioned has no express limitations and is, therefore, unlimited on this point.

The case at bar is similar to the case of *Powell's executor* v. *Richmond*, 94 Va. 79, in which it was contended that the City was limited to a period of five years within which to enforce its tax lien on real estate, because the State was so limited by V. C., 636, but Keith, President, held that the city had a lien without limitation on the time of its enforcement, under its Charter, section 75, which simply gives the right to a lien without any express limitation. *Nullum tempus occurit regi* is a familiar principle protecting public rights and extends to cities; 3 Dillon Municipal Corporations, Sec. 1194, p. 1902. Being for the enforcement of a public right rather than the recovery of a debt, the collection of taxes is not barred by any statute of limitations unless expressly so provided by law; 28 Cyc., 1304; 37 Cyc. 1147; Cooley on Taxation, 2nd Ed., p. 448; *Powell's executor* v. *Richmond*, 94 Va., *supra*. It follows, we think, that the City of Richmond has an unlimited right to distrain and a well recognized lien on personal property for taxes from the date of

their assessment until paid or, at least, until the goods and chattels pass into the hands of an innocent purchaser for value. This leads us to a consideration of the status and rights of the landlord. It is said in 5 Cyc. 328: "Claims for rent due at the time of the filing of the petition in bankruptcy are provable, but the landlord cannot prove a claim against the bankrupt for rent which would accrue subsequent to the date of adjudication." As was held in *re* Jefferson, 93 Fed. 948: "The Bankrupt Act dissolves all the contracts of the bankrupt and the one with the landlord is no more sacred than the others." In this case it was also held that a State statute providing, in case of a levy under an execution or attachment, that a year's rent to accrue shall be paid out of the proceeds as a prior claim is not applicable to cases in bankruptcy. The relation of landlord and tenant must of necessity cease—*Bray* v. *Cobb*, 100 Fed. 270. In the case at bar, therefore, the relation ceased with the filing of the petition, on November 6, 1909, or, certainly, at the adjudication, on February 3, 1910. In fact, it was actually terminated by the receivership on November 3, 1909. The landlord's right to distrain is given by Sections 2791 and 2792, of the Code of Virginia. Under the former a distress may be levied on any goods of the lessee or his assignee, or under tenant found on the premises, or which have been removed therefrom not more than thirty days, but it is expressly provided by Section 2792 that "neither this nor the preceding section shall affect any lien for taxes, levies or militia fines." It follows, therefore, that the right to distrain is expressly subordinated to the lien for taxes and levies and this fact is again made manifest by Section 9, Chapter 16, Richmond City Code, 1910, and Chapter 14, Richmond City Code, 1899, which provides that taxes may be collected by distraint from a tenant and that the latter shall have credit for the same against the landlord out of the rents due him. It is manifest that Section 2792, of the Code of Virginia, providing that the right to distrain for rent shall not affect any lien for taxes, does not mean that there is no lien for taxes until after a distress levy therefor, for the levy gives actual possession which could

not be interfered with by subsequent distress. It is further manifest that Section 2792, refers to the inchoate lien for taxes prior to the actual levy and is a declaration of the fact that there is such a lien which, as we have seen, attaches as of the day of the assessment. Were this not so, then a landlord might defeat the City of its current taxes by a levy at any time prior to September 1st of any year, and might also defeat the State, whose right to distrain begins on the 15th day of June in each year, as provided by V. C., 604. In fact, therefore, both the landlord and the State and City are given inchoate liens for their claims and both are allowed to distrain, but the landlord is expressly subordinated to the City and State, nor was it necessary for the City to perfect its lien by a levy in order for it to be preserved in this Court. *Swartz* v. *Hammer*, 194 U. S., *Supra.* Whether the landlord's levy within four months of adjudication is discharged by Section 67 (f) of the Act is a question upon which the Courts are divided, *re* Richards 37 C. C. A. 634; *re* Doherty, 109 Fed. 480; *re* Belknap, 129 Fed. 646; *re* Consumers' Coffee Co., 151 Fed. 241; Collier on Bankruptcy, 8th Ed., 744—but whatever may be true of the distress lien, it cannot be denied that the attachment lien was obtained through legal proceedings and is discharged by Section 67 (f) of the Bankrupt Act: *Barksdale* v. *Hendree*, 2 Patt. & H., 43; *Delaplain* v. *Armstrong*, 21 W. Va. 211; *Pennsylvania R. R. Co.* v. *Rogers*, 52 W. Va. 450.

Under Section 51 of the Charter and Section 22 Ch. 16, of the Ordinances, the tax of 1907 was not returned delinquent until February 1, 1908, nor the tax of 1908, until February 1, 1909, nor the tax of 1909 until February 1, 1910. The Collector of City taxes might have distrained in each year after September 1st and until February 1st, of the succeeding year—that is until the beginning of the next fiscal year. On February 1st, of each year, the delinquent taxes of the preceding year were turned over to the Collector of Delinquent Taxes for collection by the same means and processes, *i. e.*, by distress, etc., without limitation as to time. The delinquent's goods and chattels, therefore, are never free

from the inchoate lien or from a liability of its being perfected by distress. They were then subject to this lien when the landlord levied on November 1, 1909, and when the receivership began on November 4, 1909, and the adjudication was had on February 3, 1910. Indeed, the 1909 tax was not even delinquent when receivers were appointed and was binding, as the tax of the current year, on assets in the hands of the receivers along with the taxes for 1910 and 1907 and 1908, and as we have seen the landlord's lien under 2791 and 2792 and his attachment under 2962 cannot affect the lien for taxes. Nor do the provisions of Charter section 72 affect the result. It says the collector may be vested with all the power of a sheriff as collector of State taxes. The Charter was approved May 24, 1870, and prior to that time the sheriff collected State taxes. But the power to do so after 1870 was taken from sheriffs and vested in the treasurers, nor have any powers been given sheriffs since.

Under the acts prior to that time the course of collection was as follows, as appears from the Code, 1860. A copy of the books made up by the Commissioner of the Revenue, was delivered to the sheriff, who began his collections as of July 1st, and he had the right to distrain after that day.

By section 5, any goods or chattels of the person assessed in the county or corporation could be distrained, and the sheriff was given two years within which to distrain. He made a final settlement with the Auditor before the first day of May of the year after the assessment, that is to say, since the assessments were as of February 1st—fifteen months thereafter—Ch. 35, Secs. 61 and 64, and Ch. 36, Secs. 1, 4, 5, 14, 17 and 19, 1860 Code. If the Auditor got the delinquent list before May 1st, he credited the sheriff with its amount and delivered it to any sheriff or collector of any county or corporation for collection, to be returned within a year thereafter.

Under Chapter 35, Sec. 88, the Auditor charged the sheriff with the whole amount of the taxes, shown on the books made up by the commissioner and certified to by the clerk of the court, and the sheriff had to square the money and the de-

linquents with the book. His delinquent list had to be made up as soon as practicable after October 1st, in each year (Ch. 36, Sec. 14), and had to be in the Auditor's hands within fifteen months after the assessment, if he was to be credited with the amounts shown on them. His power to distrain, therefore, so far as its fruits could show on his accounts, lasted from July 1st to October 1st—a period of three months —but for his benefit he was given two years within which to collect by distress. Meantime, he had settled with the Auditor and the collections by distress made by him between October 1st and the end of the two years went to reimburse him for the settlement already made with the Auditor on the basis of his lists of October 1st. Of course, such belated distress proceedings could only have been for taxes he failed to return as delinquent and had been called upon to pay. As to those returned delinquent and credited, his power to collect and to distrain ended on May 1st, if not on October 1st, preceding. But that did not mean that the State had lost the power of distress, for Ch. 36, Sec. 20, expressly required the Auditor to place the delinquent list in the hands of any Sheriff or Collector of any county or corporation, and *he* was allowed a year thereafter in which to collect the tax returned delinquent, and, by the same process of distress and the like. (Ch. 36, Sec. 4). The State's right to distrain did not end even there, for Ch. 36, Secs. 25 and 26, authorized the Auditor at any time and as often as he pleased, to appoint a Collector in any county or corporation to collect arrears of taxes and to allow him a reasonable time within which to do so. That these collections might be by distress appears from the express provision of Ch. 36, Sec. 4.

The State's right to distrain was, therefore, without limit and the limitation was altogether on the time granted the officer within which to recoup for losses incurred in the settlement made with the Auditor on May 1st, of the year after assessment, by reason of error in failing to return delinquents as delinquent or on account of a failure to have them credited as delinquents. It was not a limitation on the State. It was hardly a limitation on the officer who, by the way,

might have lost his office, but it was a gratuity to the officer extending his powers for his own benefit to a stipulated time.

Exactly the same course of procedure was continued as to Treasurers in the place of Sheriffs, by the Code of 1873. From Ch. 46, Secs. 21 and 22, and Ch. 37, Secs. 2, 3, 12, 15 and 18, it appears that the Treasurer received taxes from February 1st to December 1st, when 5 per cent. was added and they were handed over to the Collectors of the townships, who had two years within which to distrain on any goods and chattels in the county or corporation belonging to the person assessed. He made out his delinquent list on February 1st (twelve months after the assessment), having had the right to distrain only since the preceding December 1st (two months). The list was sent to the Auditor and if received before the first day of April next, after the taxes were assessed, the Treasurer was credited with the amount—that is to say, his final settlement was made fourteen months after the taxes reached him on the basis of lists made up twelve months after the taxes came to him, and yet his power to distrain lasted two years. But the Auditor had the same duty as before, to place the delinquent lists in the hands of any Treasurer or Collector for collection, to be returned within a year (Ch. 37, Sec. 18), and by Secs. 21 and 22, he was given the same power to appoint, whenever and as often as he pleased, collectors to collect arrears of taxes—and in both cases by distress, as provided by Sec. 2.

The same course is prescribed by the laws in force since Pollard's Code of 1904. By Ch. 27, Sec. 603, the Treasurer collects from July 1st to December 1st, when he adds 5 per cent. penalty. After December 1st, he levies a distress warrant, and by section 604, on December 1st, he makes affidavit to the Auditor within fifteen days of all State taxes collected and pays the amount into the Treasury. On or before June 15th, the Treasurer makes his final settlement with the Auditor, showing collections, insolvents and delinquents. By 605, he makes out his lists, one of them delinquents, not later than July 1st of each year, which are sent to the Auditor as before. (Sec. 608). By Sec. 610 the Auditor credits the Treasurer

with the amount of taxes shown on the delinquent and erroneous lists if received within three months next after his final settlement—that is, within nineteen and one-half months after the assessment—thereby allowing the Treasurer ten months within which to distrain for the benefit of the State. But he has that right nine months longer for his own benefit, *i. e.*, for a year from his final settlement on June 15th. The Auditor, within sixty days after receiving the delinquent lists, places them in the hands of any Sheriff, Sergeant, Constable or Collector, except the officer returning them, for collection, to be accounted for within one year after the list is placed in his hands. The Section 612 expressly gives such officer power to distrain.

By Section 619, the Auditor may, whenever and as often as pleases, appoint a collector in any county or city to collect taxes and levies on persons and property therein returned delinquent—such collector to have a reasonable time—and by Section 622, any goods or chattels of the delinquent in the county, etc., may be distrained by the Collector.

Section 623 gives *the treasurer* the right to distrain for taxes, etc., "*for which he has accounted* to the auditor of public accounts and the county authorities, respectively, at any time within one year after" the time fixed for his final settlement with the auditor—that is to say one year from June 15th and twenty-eight and one-half months after the assessment. Of this year the results of only three months' work could go to the State and the work of the remaining time would be for the personal benefit of the treasurer. As stated above, this is plainly a favor granted the treasurer to enable him to recoup for erroneous payments made in his final account. It limits the favor to the treasurer, but does not limit the State.

It follows from what has been said that there are several remarkable things to be said about the decision of Cardwell J. in *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 49-50:

1*st.* Neither the State nor city filed briefs or were represented.

2*nd*. The decision says V. C. 623 gave the *State* a right to levy, whereas it only gives a personal right to the *treasurer* to do so.

3*rd*. The decision says V. C. 623 gave the State a right to levy for *one year from the date on which taxes in her favor were assessed*, whereas the section gives the treasurer that right for one year from *the date fixed for his final settlement with the auditor*, and the final settlement is had on June 15th, which is sixteen and one-half months after the assessment.

4*th*. The decision construes a section (623) intended to be a personal privilege of the treasurer and an extension in time of his powers of distress—a privilege that is wholly for the treasurer's personal benefit—into a limitation upon the power of the State to collect its revenue.

5*th*. The decision wholly ignores the extensive powers of the auditor and the collector under Section 612 and loses sight entirely of the continuing and unlimited power of the auditor and possible collectors under Sections 619, 620 and 622.

6*th*. The decision ignores the history of the State's power to distrain for taxes under the statutes and is forgetful of the universal rule and of the Statute V. C. Sec. 492 (b) that courts having a fund in *custodia legis* will, as the representative of the sovereign, make no order for distribution of the fund to creditors without providing for the sovereign's revenues—as was held by Whittle J. in *Taylor* v. *Sutherlin-Meade Co.*, 107 Va. 797, and re Tyler, 149 P. S. 164.

7*th*. As applied to the case at bar the decision would ignore the limitation put on the landlord's power of distraint as against the State's lien for taxes by V. C. 2791-2792.

8*th*. It would ignore the provisions of the Richmond Charter under which the collector, having been charged by the auditor with all of the taxes extended on the books by the commissioner, makes final settlement with the auditor on February 1st on which day his power of distress ended after having lasted for five months and on that day the delinquent list is given to the collector for delinquent taxes for collection with the same powers and by the same means and processes

(distress) and they remain in his hands until collected. Charter Sec. 51.

The collector of delinquent taxes, therefore, corresponds to the special State collectors appointed by the auditor under V. C. 619, except that his office and duties and powers are permanent.

We think we have clearly established the following points:

1. The city's right to distrain is paramount to that of the landlord. V. C. 2791-2792 and 2962.

2. The lien of the city arising out of this right is identical in character with the landlord's lien, though superior to it, and, if the landlord's levy within four months was valid as merely perfecting a pre-existing lien, it is valid only as against other contract creditors, for the city had at the time of the levy an equally valid and a superior lien.

3. There is no limitation in time on the right of the State or city to collect taxes by distress and the lien arising out of that right is continuous.

4. The decision in the Phillips Line case to the contrary construes a favor with a time limit granted to the treasurer into a limitation upon the power of the State and, whether erroneous or not, is not a controlling decision as to the city of Richmond for there is no such limitation as to it as is said to exist in the case of Petersburg.

5. Section 64 (a) of the Bankrupt Act enacts into law the long established and universal rule that courts, as representatives of the sovereign, will make no order for the distribution of a fund in *custodia legis* without providing for taxes due the sovereign. It places the city and State upon the same footing, without distinction, as the United States and the United States courts must act in questions of State and city taxes as they would act if the tax were due the United States. *Waco* v. *Bryan*, *C. C. A.* 127 Fed. 80; *New Jersey* v. *Anderson*, 203 U. S. 489. Section 64 (a) intends to give taxes priority in distribution over all mere contract creditors whether with or without liens and it is immaterial whether the State or city has a lien or not, for the act controls.

(203 U. S. 490). Nor can this priority be lost by the laches of the collectors for the act applies to "*all taxes legally due and owing.*" *Re* Conheim 100 Fed. 268; *Re* Weissman 178 Fed. 115.

6. In the case at bar, regardless of other reasons, the tax of 1910 should be paid because assessed after the receivership and before the adjudication. *Re* Tyler 149 U. S. 184. So, the tax of 1909 should be paid because it was due and owing when the receivers took charge and did not become delinquent until long afterwards. Meantime, the collector and the delinquent collector were prevented from distraining by the receivership and adjudication and the levy of the landlord could not affect the tax lien. As to the tax of 1907 and 1908, the goods and chattels were liable to distress by the collector of delinquent taxes, notwithstanding the landlord's levy (V. C. 2792) and are given priority over him by 64 (a).

7. The only alternative to the construction of Section 64 (a) here urged is that stated by the defendants: "*taxes are relegated to the extreme rear* save as to general creditors alone," and this, we submit, is violative of public policy and of the policy of all previous bankrupt acts since it must apply to the United States as well as to the individual States.

And, finally, we deny that the landlords have any right to saddle the city with responsibility for their own act in permitting the tenant to fall into arrears of rent. The city had just as much right to assume that the landlords were collecting their rent as they had to assume the collection of taxes. Indeed, the non-payment of the tax was a fact of public record, whereas the arrears of rent were secret and unknowable. If anybody is to suffer for the indulgence shown the tenant it ought, in equity to be the landlord whose indulgence was knowable only by himself and his tenant. It is, therefore, insisted by the respondent that even under the State law it was given a lien for the taxes in question for, as was held in the case of *Hardy, Trustee, et als.* v. *Norfolk Manufacturing Co.*, 80 Va. 418: "A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge." Nothing could be more certain than that a city is given a hold or claim upon the property of a citizen for the

tax charged against him, and, under the terms of the law applicable to the taxes of the City of Richmond, there is no limit to its powers to enforce this claim by seizure of the property of the tax debtor. That the tax lien was superior to all other liens has been so often decided that we simply refer to *Stevenson* v. *Henkle*, 100 Va. 598, and the cases there cited which, although relating to the tax lien on real estate, are applicable to any other tax lien. Since, therefore, the taxes were due as of February 1st of each year, the lien for them likewise dates from that day and cannot be disturbed by the landlord or any other creditor. V. C. Sec. 2792—Bankrupt Act Sec. 64 (a).

Respectfully submitted,

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